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ADMINISTRATIVE EXERCISE OF THE POLICE POWER.

[*Continued.*]

II.

ADMINISTRATIVE ORDERS AND EXECUTION.

PRECAUTIONARY regulation cannot always afford adequate protection to public health and safety. Many acts must be prohibited altogether, irrespective of the personal qualifications of those who would undertake them; and the denial of permission to proceed obviously cannot guard against the perils which arise from natural conditions and human neglect. The exercise of the police power will therefore often take the form of absolute prohibition and of specific commands to take positive remedial action, or even of such action by governmental authorities.

Here, as in precautionary regulation, the importance of expert judgment and of flexibility in the law induces the legislature to vest wide powers in administrative bodies. The discretion so vested may consist in the power to issue general regulations, supplementing the statute, and relating to designated acts or conditions wherever committed or existing within the area over which the administrative authority has jurisdiction. These general regulations may be unlimited as to time,[1] or promulgated only for some temporary emergency.[2] In other instances the statute may itself condemn certain physical conditions, and vest in some administrative body

[1] State *v.* Speyer, *infra*, p. 344.

[2] Jew Ho *v.* Williamson, *infra*, p. 341.

the power to direct the alterations to be made by specific orders in each individual case;[3] or the board may be authorized to select the particular property, acts, or practices assumed to be hazardous, and direct such discontinuance or modification as it may judge necessary.[4] Finally, the administration may be empowered to take action itself, forcibly interfering with person or property to apply the necessary remedy.[5]

A. *Necessity for Notice and Hearing.*

(1) *General Regulations.* — Where the persons affected by any regulation or order cannot be definitely known, the requirement that they must have notice and an opportunity to be heard before its issue would obviously defeat the exercise of the power vested. Accordingly the granting of such opportunity is not deemed a prerequisite to the issue of regulations general in scope. In Belcher *v.* Farrar[6] it was held that the order of the board of health prohibiting the manufacture of kerosene within the town limits was not invalidated by the fact that it was passed without first giving notice to those engaged in carrying on the trade.

(2) *Special Orders.* — Often the order of the board will relate only to a named individual. The legislature may itself designate the objects or acts which it deems dangerous, and leave to the administrative body only the power to specify the remedial action to be taken in each particular case. Here there is no inherent reason why the individual concerned may not be given an opportunity to be heard. But here also such opportunity is not deemed essential to due process.

The statute under consideration in Health Department *v.* Rector of Trinity Church[7] required that all houses of a certain description should "upon direction of the board of health" be supplied with water "in sufficient quantity" at one or more places on each floor occupied by a family. The owner objected that the order of the board was made without notice to him. But the court replied that the changes might have been ordered specifically by the legislature

[3] Health Department *v.* Trinity Church, *infra.*

[4] Board of Health *v.* Copcutt, *infra*, p. 335.

[5] North American Cold Storage Co. *v.* Chicago, *infra*, p. 336.

[6] 8 Allen (Mass.) 325 (1864).

[7] 145 N. Y. 32 (1895).

without giving notice to persons to be affected thereby, and asserted that the fact that the legislature had chosen to delegate a certain portion of its powers to the board of health did not alter the principle.

The order in this case, though relating to an individual piece of property, was not in the nature of an adjudication, requiring the ascertainment of facts from conflicting evidence, but was merely the declaration of the will of the governing authority, — the making of a special regulation to fill in the details of the statute, which by reason of the flexibility of its requirements may be regarded merely as an amalgam of separate statutes passed in respect to each member of the class to which its general provisions relate. The legislature might have passed a special enactment for each tenement house in the state; so that the court was clearly justified in applying the same principle adopted with respect to regulations more general in scope.

(3) *Adjudications.* — The administrative action to which a property owner objects may consist in a determination or adjudication that dangerous or unsanitary conditions exist, as well as a declaration of the remedial action deemed necessary. Where the property admittedly falls within the ban of some administrative prohibition because of certain characteristics inhering in all property of the same general nature or devoted to the same general purposes, we have merely an exercise of the general ordinance power already considered. But when the owner denies that his estate is within the iniquitous class, and the administrative order involves a determination of the dispute, or where it is based on conditions peculiar to the individual parcel, we have action commonly deemed to be of a judicial nature, where notice and an opportunity to be heard is supposed to be essential. But even here, the doctrine prevails that such notice and hearing may be dispensed with.

In an action for penalties for violating the orders of a board of health relative to the destruction of a certain dam and a bill to enjoin further violation,[8] it was held that the defendant had no ground of complaint merely because the order which decreed the destruction of his particular piece of property was passed without notice and an opportunity to be heard. The same court refused to review the proceedings of the board by *certiorari*, on the ground that it

[8] Board of Health *v.* Copcutt, 140 N. Y. 12 (1893).

had the right to act "upon its own inspection and knowledge of the alleged nuisance," and could obtain its information "from any source and in any way." [9]

But in all these instances, the issue of some regulation or special order is in itself merely a threatened, not an actual, invasion of property right. Where it is not to be enforced without first giving the owner an opportunity to comply with its demands, he may reach the ear of some chancellor and urge other reasons for enjoining the enforcement of the administrative order, than that it was issued without granting him prior audience.[10]

(4) *Summary Execution.* — Meanwhile, however, the danger which the administration sought to avert may already have accrued. In the removal or destruction of conditions dangerous to public health and safety, prompt action is often of the utmost necessity. The administration is therefore often authorized to remove or destroy property without even notifying the owner that any action is contemplated. Such summary execution is not improper merely because the owner had no prior opportunity to take action himself or to dissuade the board from acting.[11]

In dismissing a bill seeking to enjoin health officials from destroying certain poultry in cold storage without first giving the owner an opportunity to be heard as to its condition, the Supreme Court refers to the difficulty of guarding against the peril from unwholesome conditions while the hearing is in progress, and holds that in matters relating to the destruction of food not fit for human use, the question whether the danger to the public health is such as to require the denial of this preliminary hearing is one for the reasonable discretion of the legislature.[12] They held that this boundary had not been transgressed, in spite of the complainant's plea that the denial of a hearing is unnecessary as to the condition of food in cold storage, which can do no harm until it is removed.

The owner complained also that he was not permitted to carry on his ordinary business until he delivered the poultry claimed to be diseased. The point was waived in order to secure a decision simply

[9] People *ex rel.* Copcutt *v.* Board of Health, 140 N. Y. 1 (1893).

[10] See *infra*, "Judicial Review."

[11] This power vested in administrative authorities is no greater than that exercised by individuals. A private individual may abate summarily a public nuisance by which he is specially aggrieved. See cases cited in Fields *v.* Stokely, 99 Pa. St. 306 (1882).

[12] North American Cold Storage Co. *v.* Chicago, 211 U. S. 306 (1908).

as to the omission of a hearing; but the court observed that such action would seem to have been arbitrary and wholly unnecessary. It would seem, however, that if authorized by the statute, it should be sustained. When the owner refuses to separate the bad from the good, adequate protection requires that he be prevented from distributing any of the products so intermingled.

Thus it is established that the granting of an opportunity to be heard is not a prerequisite of the validity of administrative action in the exercise of the police power, whether it take the form of the issue of a general or special regulation, a determination that certain property constitutes a nuisance, or forcible destruction or removal.

This power of summary administrative action without notice and an opportunity to be heard is sustained also with respect to the forcible removal to a pest-house of a person infected with a contagious disease,[13] and it seems, also, a person having the appearance or symptoms of a contagious disease;[14] the confinement to his home and quarantining of a person reasonably but erroneously believed to be infected with a contagious disease;[15] the seizure of samples of milk for purposes of analysis;[16] the destruction of that found below standard,[17] and similar destruction of commercial fertilizers which, though innocuous, are equally impotent to do good, and therefore valueless for commercial purposes;[18] the seizure of intoxicating liquor kept and intended for unlawful use,[19] and of property deemed unsuitable for any righteous purpose, such as gambling instruments;[20] and the removal and incidental destruction of articles which, though capable of lawful use, are actually employed for

[13] Haverty *v.* Bass, 66 Me. 71 (1876).

[14] Brown *v.* Purdy, 8 N. Y. St. Reporter 143 (1886), (*semble*).

[15] Beeks *v.* Dickinson County *et al.*, 131 Ia. 244 (1906); Valentine *v.* Englewood, 76 N. J. L. 509 (1908).

[16] Commonwealth *v.* Carter, 132 Mass. 12 (1882).

[17] Deems *v.* Baltimore, 80 Md. 164 (1894).

[18] Patapsco Guano Co. *v.* Board of Agriculture, 171 U. S. 345 (1898). *Cf.* Buttfield *v.* Stranahan, 192 U. S. 470 (1904), for similar action by federal authorities under the power to exclude imports from foreign countries.

[19] State *v.* O'Neil, 58 Vt. 140, 161 (1885).

[20] J. B. Mullen & Co. *v.* Mosley, 13 Idaho 457 (1907), Police Commissioners *v.* Wagner, 93 Md. 182 (1901), and cases cited in the opinion. *Contra*, Lowry *v.* Rainwater, 70 Mo. 152 (1879): "The vices which acts authorizing these summary proceedings propose to eradicate are inconsiderable in comparison with the value of the constitutional guarantees which secure to the citizen his liberty and his property."

illegal purposes in such a manner that their forcible removal is the only method of terminating promptly a continuing and persisting violation of the law, effected without the aid of renewed or repeated activity of any human agency.[21]

In the Supreme Court the power of summary removal of articles so violating the law is confined to those of trifling value.[22] This limitation prevents the exercise of summary administrative action to secure the seizure and sale of teams employed unlawfully in cutting timber on public lands,[23] and of boats or vessels used by one person in interfering with oysters or other shell-fish belonging to another.[24] It is held that judicial proceedings are always necessary where the sale and not the destruction of property is to be effected. The courts sanction the summary removal of wooden roofs and buildings constructed in defiance of the building laws; [25] but reasonable care must be taken to preserve the materials for the owner.[26] In the cases relating to buildings, notice to the owner preceded the abatement by the administration; but in the Indiana decision it was declared that buildings erected in violation of the building laws are public nuisances, and that public nuisances may be abated without notice.

B. *Judicial Review.*

Though administrative action is not deemed improper merely on the ground that notice and an opportunity to be heard are absolutely essential, the validity of orders issued or of action taken may be questioned in judicial proceedings of various kinds.

Where the officers have already accomplished their object by direct physical invasion of property, judicial redress is necessarily limited to a suit for damages. If, however, the administrative action consists only in a threatened invasion or in an order to the owner to take action himself, the courts are open to receive his motion for a bill of injunction. If under the statute the administration sues for the ex-

[21] Lawton *v.* Steele, 119 N. Y. 226 (1890). *Contra*, Ieck *v.* Anderson, 57 Cal. 251 (1881).

[22] Lawton *v.* Steele, 152 U. S. 133 (1894).

[23] Dunn *v.* Burleigh, 62 Me. 24 (1873).

[24] Colon *v.* Lisk, 153 N. Y. 188 (1897).

[25] King *v.* Davenport, 98 Ill. 305 (1881); Hine *v.* New Haven, 40 Conn. 478 (1873); Baumgarten *v.* Hasty, 100 Ind. 575 (1885).

[26] Eichenlaub *v.* St. Joseph, 113 Mo. 395 (1892).

pense of executing its order after its non-observance by the owner, his defense may question the propriety of the steps taken. And the same privilege obtains where the administration itself calls upon the court for aid in enforcing its decree, or to punish the owner for disobedience.

In all these instances, the possibility of raising the question is manifest. The problem is to discover what respect the courts will pay to the expressed opinion of the administration. How far will they annul or revise the administrative requirements?

The language of some opinions has seemed to indicate that the courts will not question the administrative determination that certain conditions constitute a nuisance.[27] But against any possible contention of such finality or conclusiveness stands the well-nigh

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[27] In Kennedy *v.* Board of Health, 2 Pa. St. 366 (1845), the court excluded evidence as to the cause of a nuisance in an action for the expense of its abatement, and declared: "It is not easy to perceive the relevancy of such evidence, unless it was intended to show by it, that there was in reality no nuisance to be removed. But this latter could not be proved, for the act of Assembly on the subject makes the order of the board conclusive, and expressly enacts that the fact of the nuisance shall not be inquired into. The board decided that the nuisance existed on the lot of the defendant, and the *fact* being so determined, it made no difference from what cause it arose." But in this case the owner did not deny the existence of the nuisance, but tendered his evidence to show that it was caused by others, who should bear the expense of abatement.

In St. Louis *v.* Stern, 3 Mo. App. 48 (1876), a prosecution for failure to abate a nuisance, the court observed: "When the Legislature delegates to certain municipal agents a general power to provide for the preservation of the public health by the removal of nuisances, an adjudication by such agents upon the fact of a nuisance existing within their local jurisdiction is conclusive." But the qualification was added: "At least, in every case, where the subject matter comes within the classifications of *primâ facie* nuisances, and nuisances *per se*."

In Green *v.* The Mayor, 6 Ga. 1 (1849), the court declined to review on *certiorari* the validity of an ordinance prohibiting the growing of rice, saying that the judgment of the Council upon the question of nuisance was "conclusive evidence of that fact." "Legislative bodies judge of the exigency upon which their laws are founded; and when they speak, their judgment is implied in the law itself." The language used is broad enough to forbid judicial review in whatever proceeding the question arises; but from subsequent decisions in the same jurisdiction, it is clear that the doctrine is not applied to proceedings other than those which seek to prevent the administration from executing its determination. Mayor *v.* Mitchell, 79 Ga. 807 (1887); Mayor *v.* Mulligan, 95 Ga. 323 (1893); Western & Atlantic R. R. Co. *v.* Atlanta, 113 Ga. 537 (1901). Moreover, Green *v.* The Mayor is rested on the authority of Martin *v.* Mott, 12 Wheat. (U. S.) 19, which principle, says the court, "applies with greater force to the *law-making power itself*, than to any single officer of the Government." But in Martin *v.* Mott the determination declared conclusive related to the necessity of calling forth the militia, the exercise of a high executive prerogative, with which the courts never interfere.

universal authority.[28] The decisions which overrule the objection that the administrative action was taken without granting an opportunity to be heard insist that this ruling is possible only because the administrative determination cannot be conclusive upon the owner, and that a hearing on the disputed question may later be obtained in judicial proceedings.[29]

But though the courts cling tenaciously to the right to review, they announce repeatedly that respect is due to the opinion of the administration. In Commonwealth *v.* Patch [30] the court declared that in the absence of evidence to the contrary, it would assume that the by-law prohibiting the keeping of swine in particular parts of the city was reasonable. Likewise, in an action to restrain the landing of persons infected with cholera, Judge Cullen declared that the question "is one resting in the discretion of the health officer, as is also the selection of an appropriate site for the landing; and in the absence of an abuse of discretion, his decision in this respect will not be interfered with by the courts." [31]

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[28] In a bill to enjoin the destruction of a dock declared to be a nuisance, Mr. Justice Miller declared: "It is a doctrine not to be tolerated in this country that a municipal corporation, without any general laws either of the city or the state, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property of the city, at the uncontrolled will of the temporary local authorities." Yates *v.* Milwaukee, 10 Wall. (U. S.) 497 (1870).

In Hutton *v.* Camden, 39 N. J. L. 122 (1876), the court held that it was error to exclude evidence of the condition of the premises in a suit by the board of health for the expense of abating what they had declared to be a nuisance. "The authority to decide when a nuisance exists, is an authority to find facts, to estimate their force, and to apply rules of law to the case thus made. . . . The finding of a sanitary committee, or of a municipal council, or of any body of a similar kind, can have no effect whatever, for any purpose, upon the ultimate disposition of matters of this kind. . . . The question of nuisance can conclusively be decided, for all legal uses, by the established courts of law or equity alone, and the resolutions of officers, or of boards organized by force of municipal charters, cannot, to any degree, control such decision."

[29] "If the decisions of these boards were final and conclusive, even after a hearing, the citizen would in many cases, hold his property subject to the judgments of men holding ephemeral positions in municipal bodies and boards of health, frequently uneducated and generally unfitted to discharge grave judicial functions. Boards of health under the acts referred to cannot, as to any existing state of facts, by their determination make that a nuisance which is not in fact a nuisance. . . . It is the actual existence of a nuisance which gives them jurisdiction to act." People *v.* Board of Health, 142 N. Y. 1, *supra*. *Cf.* North American Cold Storage Co. *v.* Chicago, 211 U. S. 306, *supra*.

[30] 97 Mass. 221 (1867).

[31] Young *v.* Flower, 22 N. Y. Supp. 332 (1893). But the declaration was qualified by

Where an owner has refused to avail himself of an opportunity to present before the administrative board his objections to their contemplated action, he may find himself subsequently precluded from questioning the reasonableness of the action taken. In Metropolitan Board of Health *v.* Heister [32] suits by the board to recover penalties for the violation of their orders were joined with bills by the owner to restrain their enforcement. The preliminary order to desist from slaughtering was made without notice; but the board directed that it should not be executed until notice served and an opportunity to be heard. The owner declined to present his case before the board; and the court holds, without citation of authority, that "he cannot now complain that their judgment upon the facts is held to be conclusive against him." [33]

Judicial review in the particular instance is obviously unnecessary when the thing prohibited falls within the class of *primâ facie* nuisances or nuisances *per se*,[34] or when the question of the rightfulness of the administrative determination is already *res adjudicata* between the parties.[35]

There are indications that an administrative determination sanctioning an act will receive greater judicial respect than a finding of condemnation.[36] But no such doctrine prevails as a general princi-

the assertion that the emergency must actually exist, of which the officer is not the sole judge, and that the act done must be fairly and reasonably appropriate for the emergency that has arisen.

In another bill to enjoin the enforcement of a quarantine regulation, where the court found conflicting evidence as to the presence of the bubonic plague, it declared that although it was of the opinion that the plague did not exist in San Francisco, it felt that where there was the slightest doubt, the decision of the board should be sustained. Jew Ho *v.* Williamson, 103 Fed. 10 (1900).

In sustaining an ordinance prohibiting further burial in cemeteries within the city limits, Mr. Justice Holmes observed that the legislation should not be overthrown merely because the opinion of the court as to the reality of the danger from the prohibited act differs from that of those who passed the ordinance. Laurel Hill Cemetery *v.* San Francisco, 216 U. S. 358 (1910).

[32] 37 N. Y. 661 (1868).

[33] The authority of the case is weakened by the fact that the court below, though it found for the owner, had determined as a fact that the business of slaughtering within the city was dangerous to health. The refusal to litigate the question before the board was based on the contention of their want of power over the subject matter.

[34] St. Louis *v.* Stern, *supra*, p. 339.

[35] Wheeler *et al. v.* City of Aberdeen *et al.*, 87 Pac. 1061 (Wash. 1906).

[36] White *v.* Kenney, 157 Mass. 12 (1892). In dismissing a bill to enjoin the erection of a stable for which a license to erect had been granted after a hearing by the board of health, the court excluded evidence as to the probable effect of the erection, saying

ple. In Garrett *v.* State [37] it is held that a board of health has no authority to license the manufacture of fertilizers in such a way as to create what the court deems a public nuisance; and in Pennsylvania R. R. Co. *v.* Angel [38] the company was restrained from conducting what the court declared to be a nuisance, although this use of its property was authorized by the legislature and was necessary to the conduct of its business.[39]

The abatement of a nuisance is often no more of a deprivation to the owner than is its continuance to his neighbors. There seems no good reason why they should be denied the judicial hearing accorded to him. But a license would properly be a bar to a criminal prosecution for conducting the alleged nuisance; and it seems that after express permission, the alleged nuisance can be abated only by judicial proceedings.[40]

Even where the court agrees with the administration that a nuisance exists, they exercise the right to decide whether the abatement ordered or undertaken is proper and necessary.[41] Where a court agreed with the board that a building condemned was unfit for habitation, it declined to sanction the demolition ordered, in the absence of evidence that it could be made fit for habitation, and, even if that were established, unless it should appear that health was endangered by the existence and not merely the use of the building.[42] And it has been held that a jury may on appeal from an order of a board of health prohibiting slaughtering on certain premises, permit the business to be carried on under such restrictions that the premises will be at all times kept neat and clean, where it appears that this can be done.[43]

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that the statute gave the determination of the question to the board of health, and implied that the courts could not restrain any erection authorized by them.

[37] 49 N. J. L. 94 (1886).

[38] 41 N. J. Eq. 316 (1886). This is obviously the proper rule where conditions have altered since the license was granted. Fertilizing Co. *v.* Hyde Park, 97 U. S. 659 (1878). If a city itself maintains what the courts decide to be a nuisance, it may be enjoined, Shreck *v.* Village of Cœur d'Alene, 87 Pac. 1001 (Idaho, 1906); or held responsible in damages, Murray *v.* City of Butte, 35 Mont. 161 (1907).

[39] This position is also discussed at length in Cogswell *v.* New York, etc. R. R. Co., 103 N. Y. 10 (1886).

[40] Everett *v.* Marquette, 53 Mich. 450 (1884).

[41] Weil *v.* Record, 24 N. J. Eq. 169 (1873); Babcock *v.* Buffalo, 56 N. Y. 268 (1874) (injunction issued against filling up a canal, where nuisance could be abated by cleaning it out).

[42] Health Department *v.* Dassori, 81 N. Y. St. Reporter (47 N. Y. Supp.) 641 (1897).

[43] Sawyer *v.* State Board of Health, 125 Mass. 182 (1878).

The same doctrine prevails as to other exercises of the police power than the abatement of nuisances. The existence of conditions to be remedied is not in itself a justification for the action taken or ordered. In Jew Ho *v.* Williamson,[44] where the court conceded the presence of the plague, it examined the provisions of the quarantine regulations, and enjoined them as unreasonable and beyond the necessities of the situation.[45] Similarly in the Trinity Church case,[46] where the statute directed the installation of water service in tenement houses, vesting in the administration discretion to determine the extent of alteration, the court in its discussion laid down the boundaries within which the discretion might be exercised. The amount of expenditure required must be reasonable, and the improvement itself reasonable, considered with reference to the object to be attained, — of which the courts must within the proper limits be the judges.

The opinion says also that no punishment or penalties could be enforced against the defendant without a trial in which he could show that he did not violate the statute or the order of the board, or that his house was not a tenement house within the provisions of the act. It would seem that both might also be shown in the suit to recover the expense of making the improvement; for the former would go to the question of reasonableness, and the latter to the jurisdiction of the board.

In considering the exercise of judicial review we must distinguish between the power merely to annul, and the capacity to amend or revise. Where there is involved the validity of a regulation general in scope, whether the question arise in a suit for a penalty or for the expense of administrative enforcement, or in a bill to enforce compliance or to restrain execution, the court in disapproving of the regulation or of one of its separable provisions, must limit itself to the declaration that it is null. It cannot make a new regulation.

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[44] *Supra*, p. 341.

[45] Not over nine persons were supposed to have died from the disease and no living persons were known to have contracted it. Yet the regulations isolated twelve blocks containing twelve thousand inhabitants, permitting free intercourse between all persons within the area, but forbidding all ingress or egress. Such regulations, thought the court, would tend to spread rather than to restrict the disease. A Chinese grocer complained because his trade was interfered with. An additional reason for granting the injunction was found in the fact that the regulations appeared to be enforced only against the Chinese.

[46] *Supra*, p. 334.

It is subject to the same incapacity in all suits for a penalty, whether the order be general or special. Where, however, the order is special, relating only to an individual case, whether based on circumstances peculiar to that case, or on the contention that it falls within some more general ruling, the court may enjoin or enforce it, either in whole or in part. If the suit is for the expense of administrative enforcement, the claim may be disallowed in whole or in part.

An administrative order may be declared invalid either because the court deems it improper to vest so wide a discretion in an administrative body,[47] or because the action taken transcends the delegation.[48] Nor will it necessarily save an administrative regulation to establish that the statutory warrant is manifest and that the power delegated is not legislative. For the courts maintain a firm control over the power even of the legislature to interfere with liberty and property under the guise of the police power. Many decisions, therefore, which declare invalid an administrative regulation or order, proceed upon grounds equally applicable to the same provisions contained in legislative enactments.[49]

The ground of invalidity usually alleged is that the order is unreasonable. This may mean either that it would be an unwarranted interference by whomever exercised, or that the legislature did not mean to delegate authority to exercise power to this extent. The courts always assume that the legislature does not mean to delegate to an administrative body the power to do anything which in the opinion of the court is unreasonable. And they are more ready to predicate unreasonableness of the action of administrative bodies than of that of the legislature.[50]

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[47] State *ex rel.* Adams *v.* Burdge *et als.*, 95 Wis. 390 (1897). Here it was said that the provisions of the statute import and include an absolute delegation of the legislative power over the entire subject involved, and that the action of the board was legislative and not administrative.

[48] Philadelphia *v.* Provident, etc. Trust Co., 132 Pa. St. 224 (1890); Wreford *v.* People, 14 Mich. 41 (1865).

[49] State *v.* Speyer, 67 Vt. 502 (1895); *Ex parte* O'Leary, 65 Miss. 80 (1887).

[50] This is best illustrated by comparing the attitude of courts towards provisions in statutes with that towards similar provisions in administrative regulations, requiring compulsory vaccination or excluding unvaccinated pupils from the public schools. The former requirement is sustained in statutes, Jacobson *v.* Massachusetts, 197 U. S. 11 (1904), and regulations passed by virtue of explicit statutory authority, Morris *v.* Columbus, 102 Ga. 792 (1897); the latter, in statutes, Abeel *v.* Clark, 84 Cal. 226 (1890), and regulations under similar specific statutory delegation, Bissell *v.* Davison, 65 Conn. 183 (1894). In this case the court declined to hold the power conditioned upon the

An examination of the cases will demonstrate the impossibility of ascertaining the *criteria* of reasonableness. Of reasonableness as a test, Mr. Justice Holmes has observed: "It may be said that the difference is only one of degree; most differences are when nicely analyzed. At any rate, difference of degree is one of the distinctions by which the right of the legislature to exercise police power is determined. Some small limitations of previously existing rights incident to property may be imposed for the sake of preventing a manifest evil; larger ones could not be except by the exercise of the right of eminent domain." [51]

Though it is often said that the state in the exercise of the police power does not "take" property, but merely "regulates its use," [52] the distinction seems somewhat refined. There would seem to be in all these "regulatings" which involve the payment of money or restriction of action, a deprivation either of liberty or property. The problem is to discover whether it may be justified as a proper exercise of the police power. This the courts must solve without the aid of definitions in any constitution. They have themselves developed the doctrine of the police power as an implied qualification or limitation of the Due Process clauses of our various constitutions, and are free to control its application as they will.

The difficulty of securing an exact definition of the power may be appreciated, if not solved, by referring to a recent utterance from the Supreme Court:

"All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded,

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actual existence of an epidemic or on reasonable apprehension thereof, saying that the statute had imposed no such condition, and that there was no reason why it should be implied.

But where the delegation in the statute is couched in such general terms as "to take action in the interest of the health and lives of the community," the administrative regulations, though usually sustained in the presence of epidemic, Duffield *v.* School District, 162 Pa. St. 476 (1894), Blue *v.* Beach, 155 Ind. 121 (1900), are in the absence of actual or threatened epidemic quite generally declared invalid because unreasonable. Matthews *v.* Board of Education, 127 Mich. 531 (1901); State *ex rel.* Adams *v.* Burdge *et als.*, 95 Wis. 390 (1897); Potts *v.* Breen, 167 Ill. 67 (1897).

Where the decision is not grounded on unreasonableness, the courts usually assert that the general power delegated should be construed as meaning to authorize action only in the presence of immediate danger.

[51] Rideout *v.* Knox, 148 Mass. 368 (1889).

[52] Health Department *v.* Trinity Church, *supra*, p. 334.

and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the state. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points along the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side. . . . It constantly is necessary to reconcile and adjust different constitutional principles, each of which would be entitled to possession of the disputed ground but for the presence of the others." [53]

In another recent opinion the same jurist observes:

"And yet again the extent to which legislation may modify and restrict the uses of property consistently with the constitution is not a question for pure abstract theory alone. Tradition and the habits of a community count for more than logic." [54]

"In the long run," says Professor Seligman, "the economic interests of a community must prevail; for law is nothing but the crystallization of economic and social imperatives." [55]

We shall be aided then more by the method of enumeration than of definition. Whether or not the "Supreme Court follows the election returns," as one of our sagacious humorists avers, it is beyond dispute that popular feeling on matters relating to the conflicting interests of the individual and the group to which he belongs, exerts a potent influence upon the chosen arbiters of constitutional questions. Any attempt, therefore, to forecast the decisions of the future limiting the extent of interference to be permitted as an exercise of the police power, must recognize that the courts will be governed more by the currents of public opinion than by the store of ancient precedents.

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[*To be continued.*]

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[53] Mr. Justice Holmes, in Hudson County Water Co. *v.* McCarter, 209 U. S. 349 (1908).

[54] Laurel Hill Cemetery *v.* San Francisco, 216 U. S. 358 (1910).

[55] 25 Pol. Sci. Quar., 217.